Supreme Court, U.S.
FILED
FEB 23 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 725

POLICE JURY OF PLAQUEMINES PARISH AND NATIONAL SURETY CORPORATION,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LEANDER H. PEREZ,
Commerce Building,
New Orleans 12, Louisiana.

HENRY B. CURTIS,
412 American Bank Building,
New Orleans 12, Louisiana.

HAUSER PRINTING CO., INC., NEW ORLEANS

IN THE

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No.

POLICE JURY OF PLAQUEMINES PARISH AND NATIONAL SURETY CORPORATION,
Petitioners,

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable Earl Warren, Chief Justice of The United States, and to The Associate Justices of The Supreme Court of The United States:

Petitioners, Police Jury of Plaquemines Parish and National Surety Corporation, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on December 28, 1959, and the order of said Court denying rehearing thereof, entered on January 22, 1960.

CITATIONS TO OPINIONS BELOW

The District Court did not write an opinion on this particular controversy but prepared detailed Findings of

Fact and Conclusions of Law (R. 122-136), printed in Appendix A hereto, *infra*, p. 9, and judgments (R. 99-102), printed in Appendix A hereto, *infra*, p. 9, which were not reported. The opinion of the Circuit Court of Appeals printed in Appendix A hereto, *infra*, p. 9, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1959 (R. 157), Appendix A, *infra*, p. 9. Rehearing was denied on January 22, 1960 (R. 165), Appendix A, *infra*, p. 9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the United States can proceed against petitioners by way of summary process for the forfeiture, either in whole or in part, of a bond issued pursuant to the provisions of the Rivers and Harbors Act, 33 U.S.C. §§ 593, 594, rather than by the filing of a complaint and the issuance of a summons, as required by Rules 3 and 4 of the Federal Rules of Civil Procedure.

STATUTE INVOLVED

The statutory provisions involved are Sections 593 and 594 of the River and Harbors Act, 33 U.S.C. §§ 593, 594. They are printed in Appendix B, *infra*, p. 30.

STATEMENT

Pursuant to the provisions of the Rivers and Harbors Act, 33 U.S.C. §§ 593, 594, the United States originally instituted condemnation proceedings against certain lands located in the Parish of Plaquemines, State of Louisiana, the compensation for such lands to be expropriated was assumed by the Police Jury of Plaquemines Parish (here-

inafter referred to as "Police Jury") under the provisions of Public Law 14, Ch. 19, 79th Congress, 1st Session, Senate Document No. 188, 79th Congress, 2d Session, estimating local interest (Police Jury) cost at slightly over $80,000. The Police Jury deposited certain funds in the registry of the United States District Court in an amount estimated as proper compensation for the lands to be condemned, and, thereafter, pursuant to an express order of the District Court, a compliance bond in the sum of $150,000 was furnished by the Police Jury on which bond National Surety Corporation (hereinafter referred to as "Surety Company") was surety.

After confirmation of the awards made by the Commissioners, the Police Jury furnished an additional sum of $122,620.75, leaving a deficiency of $52,599.21 representing interest and fees. Upon the refusal of the Police Jury to pay the aforesaid deficiency sum, the United States proceeded against it and its surety by motion to show cause why the bond should not be forfeited rather than by an independent action. The Surety Company by cross-complaint demanded recovery against the Police Jury for the full amount for which the Surety Company might be cast.

The District Court rendered judgment in favor of the United States and against the Surety Company and also maintained the cross-complaint of the Surety Company against the Police Jury. The judgments of the District Court were affirmed by the Court of Appeals.

REASONS FOR GRANTING WRIT

The Court of Appeals has allowed proceedings by way of summary process for the forfeiture of a surety bond under Sections 593 and 594 of the

Rivers and Harbors Act, 33 U.S.C., which statutes do not specifically grant such a right. This issue has never been passed upon by the Supreme Court of the United States and should be settled by this Court.

The terms of the subject surety bond provide that the said Policy July and Surety Company "are held and firmly bounded unto the United States of America and all defendants" in the above entitled and numbered cause; that "The condition of this performance bond is that the Plaquemines Parish Police Jury will pay all awards and expenses of the condemnation proceeding" in said cause and that said Police Jury "shall promptly and faithfully pay and satisfy whatever judgment or judgments may be rendered in favor of the defendants in said condemnation proceedings to the full amount thereof as required by said judgments, then this obligation shall be null and void".

If this surety bond gave to the defendant landowners in the expropriation cause the right to payment of their awards, the legal question necessarily arises as to whether the landowner defendants would have a right of action against said Police Jury and Surety Company, or whether the United States would have such right of action against said Police Jury and Surety Company, to compel the payment of said awards to these third parties. Apparently this condition of the surety bond gives to the landowner defendants, and not to the United States, a right of action against the principal and surety on the bond for payment of the awards to the defendants.

It is submitted that if the defendant landowners, whose property were expropriated, have a right of action under this surety bond, such right of action cannot be

exercised in their behalf by the United States. If the United States paid the awards under the judgment of condemnation, the effect of the bond would be to give the United States a right of action for reimbursement for any payments made by it to the landowners under the judgment of condemnation, which is not the case here.

In either of these cases, it follows that such action or actions would have to be by the filing of a complaint and the issuance of a summons to said Police Jury and Surety Company and certainly not by a summary motion and rule such as was improvidently done in this case, because there is no provision of law authorizing such summary proceeding to compel payment under a conventional surety bond, such as is provided in the case of a supersedeas bond, and the bond given to secure a restraining order or preliminary injunction under Rule 65 (c) of the Federal Rules of Civil Procedure and Rule 73 (f), which provide particularly for judgment on motion without the necessity of independent action.

In the case of a supersedeas bond and the bond given to secure the issuance of a restraining order or preliminary injunction, Congress, in 1946, expressly provided for the enforcement of liability on such bonds by summary process. Rule 65 (c) of the Federal Rules of Civil Procedure provides as follows:

> "SECURITY. No restraining order of preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any payers affecting his liability on the bond or undertaking may be served. **His liability may be enforced on motion without the necessity of an independent action.** The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known."

Rule 73 (f) contains a similar enforcement provision:

"JUDGMENT AGAINST SURETY. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. **His liability may be enforced on motion without the necessity of an independent action.** The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known."

If Congress saw fit to grant by express statutory authority a right of summary process on judicial bonds as aforesaid, it would seem to follow that similar express and unequivocal authority would be required before a summary procedure can be instituted on a conventional surety bond as furnished by the Police Jury and Surety Company in the instant case.

Clearly, therefore, in this case of a conventional surety bond an independent action is necessary. We cite

La. Civil Code Art. 3043 as controlling (Appendix C).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEANDER H. PEREZ,
Counsel for Police Jury of Plaquemines Parish,
1806 Commerce Building,
New Orleans 12, Louisiana.

HENRY B. CURTIS,
Counsel for National Surety Corporation,
412 American Bank Building,
New Orleans 12, Louisiana.

CERTIFICATE

I hereby certify that a copy of the above and foregoing petition has this day been served upon the attorney of record for the United States of America and upon the Solicitor General, Department of Justice, by depositing the same in a United States mail box, with postage prepaid, addressed to them at their post office address, all in accordance with Rule 33 of this Court.

HENRY B. CURTIS

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,756

POLICE JURY OF PLAQUEMINES PARISH
and NATIONAL SURETY CORPORATION,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(December 28, 1959.)

Before JONES, BROWN and WISDOM, Circuit Judges.

PER CURIAM: Pursuant to applicable provisions of the Rivers and Harbors Act, 33 U.S.C.A. §§ 593, 594, the Police Jury of Plaquemines Parish posted security in an amount estimated as proper compensation for lands to be condemned by the United States but for which the Police Jury was to bear the cost.[1] Part of the deposit was in the form of a compliance bond of $150,000, involved in this controversy, with National Surety Corporation as surety. This was required by express order of the District Court.

[1] The District Court did not write an opinion on the present controversy but prepared detailed Findings of Fact and Conclusions of Law. Its opinion on compensation to the landowners is reported *sub nom.* United States v. 1,000 Acres of Land, 162 F. Supp. 219 (E.D. La., 1958).

The Police Jury furnishhed a total of $122,620.75 after confirmation of the award made by the commissioners under Rule 71A(h), F.R. Civ. P. This left $52,590.21 owing which represented the sum of $31,302.21 interest on the award and $21,500 fees of Rule 71A(h) commissioners less $203 deposited in the registry of the court. After the Parish refused to pay, the United States proceeded against the Police Jury and the surety by motion to show cause why the bond should not be forfeited rather than by an independent action.

Hearings were held on the motion and the Police Jury counter-claimed for all payments it had made in excess of $83,200, an amount originally estimated as the cost of the right of way, on the grounds that this was the limit of its liability. The District Judge after full hearings determined that as a matter of law the defenses asserted were of no merit and entered judgment for the United States against the Police Jury and its surety. On this ruling which we approve, there was no occasion for the offer or receipt of any testimony or other evidence. Judgment was also rendered in favor of the surety for the same amount on its cross claim for exoneration against the Police Jury.

The appellants would have had no further rights had there been an independent action. The proceedings by motion accorded every right and advantage to the surety and principal. No possible harm could have resulted. F.R. Civ. P. 61. We find no basis for any of the other objections raised.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,756

POLICE JURY OF PLAQUEMINES PARISH and NATIONAL SURETY CORPORATION,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

JUDGMENT

Extract from the Minutes of December 28, 1959.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by Counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,756

POLICE JURY OF PLAQUEMINES PARISH
and NATIONAL SURETY CORPORATION,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

ORDER DENYING REHEARING

Extract from the Minutes of January 22, 1960.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN THE
DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 3362
CIVIL ACTION

UNITED STATES OF AMERICA

versus

1,000 ACRES OF LAND, MORE OR LESS IN
PLAQUEMINES PARISH, LOUISIANA
AND I. D. ZANDER, ET AL.

JUDGMENT

(Filed: December 11, 1958)

This matter came on for hearing on November 26, 1958 on motion of the United States of America for forfeiture of the One Hundred and Fifty Thousand and 00/100 ($150,000.00) Dollar performance bond of the National Surety Corporation, New York, dated January 16, 1953, to the extent of Fifty-Two Thousand, Five Hundred, Ninety-Nine and 21/100 ($52,599.21) Dollars, for the failure and refusal of the Principal of said bond, the Police Jury of Plaquemines Parish, and the Surety of the said bond, the National Surety Corporation, New York, to pay interest on the awards of condemnation and costs of the proceeding consisting of the fees of the Commissioners in the aggregate sum of Fifty-two Thousand, Five Hundred, Ninety-Nine and 21/100 ($52,599.21) Dollars.

Present in Court were:

NORTON L. WISDOM, Special Assistant to the United States Attorney, representing the United States of America.

CURTIS, FOSTER AND DILLON, Attorneys, and EUGENE E. HUPPENBAUER, JR., Attorney, representing the National Surety Corporation.

LEANDER H. PEREZ, District Attorney, Plaquemines Parish, La., representing the Police Jury of Plaquemines Parish, La.

IT IS ORDERED, ADJUDGED AND DECREED that the bond of the National Surety Corporation, New York, dated January 16, 1953, filed in this proceeding be, and it is, hereby forfeited to the United States of America, Owner, to the extent of Fifty-Two Thousand, Five Hundred, Ninety-Nine and 21/100 ($52,599.21) Dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the United States of America, Owner, and against the National Surety Corporation, New York, Surety, in the full sum of Fifty-Two Thousand, Five Hundred, Ninety-Nine and 21/100 ($52,599.21) Dollars, being the amount required to pay interest on the condemnation awards and costs of this proceeding.

New Orleans, December 10th, 1958.

s/ J. Skelly Wright
JUDGE

IN THE
DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 3362
CIVIL ACTION

UNITED STATES OF AMERICA
versus
1,000 ACRES OF LAND, MORE OR LESS IN
PLAQUEMINES PARISH, LOUISIANA
AND I. D. ZANDER, ET AL.

JUDGMENT ON CROSS COMPLAINT

(Filed: December 11, 1958)

This cause came on for hearing on November 26, 1958 on the motion of National Surety Corporation for judgment over against the Police Jury of Plaquemines Parish in the event judgment were rendered against it for forfeiture of its bond, and the Court having granted judgment in favor of the United States of America and against National Surety Corporation, ordering the forfeiture of the bond of the Plaquemines Parish Police Jury, executed by National Surety Corporation as surety, to the extent of $52,599.21, and further ordering and directing National Surety Corporation to pay into the Registry of the Court the sum of $52,599.21 under its obligation pursuant to said bond:

IT IS ORDERED, ADJUDGED AND DECREED that National Surety Corporation do have and recover

of and from the Police Jury of Plaquemines Parish the sum of Fifty-Two Thousand Five Hundred Ninety-Nine and 21/100 ($52,599.21) Dollars, and that it have execution therefor.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of National Surety Corporation against the Police Jury of Plaquemines Parish for attorneys' fees be and the same is hereby dismissed as of non-suit, with the right being reserved to National Surety Corporation to hereafter reassert the said claim in an appropriate proceedings.

New Orleans, December 10th, 1958.

s/ J. Skelly Wright
UNITED STATES DISTRICT JUDGE

IN THE
DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 3362
CIVIL ACTION

UNITED STATES OF AMERICA
versus
1,000 ACRES OF LAND, MORE OR LESS IN
PLAQUEMINES PARISH, LOUISIANA
AND I. D. ZANDER, ET AL.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed: January 26, 1959)

This matter first came on for hearing on a motion for forfeiture of a bond filed as additional security to the extent of the amount of the funds required to pay interests on the awards of condemnation for the acquisition of the various parcels of land in litigation in this proceeding, and the costs of the proceeding in the form of Commissioners' fees, both of which were fixed by the court in the final judgment of condemnation dated September 14th, 1958.

The matter was again brought on for hearing on January 14th, 1959, on a motion for a new trial brought by the Police Jury of Plaquemines Parish, Louisiana, the Principal of the securety bond, and the National Surety Corporation, surety of the said bond.

FINDINGS OF FACTS

1.

The public project forming the basis of this condemnation proceeding is the construction of a canal, passing through the Parishes of Orleans and Plaquemines, State of Louisiana, extending from the Mississippi River at a point near Algiers, in Orleans Parish, a distance of nine miles to Bayou Barataria, in upper Plaquemines Parish, which canal is known as the Alternate Waterway Connection with the Intracoastal Canal at Algiers, as described in Senate Document No. 188, of the 78th Congress, 2nd Session.

2.

This condemnation proceeding was brought by the United States of America, pursuant to the Rivers and Harbors Act of August 8, 1917, 40 Stat. 267 (33 U.S.C. 593), and the Rivers and Harbors Act approved March 2, 1945 (Public Law 14, 79th Congress).

3.

The Police Jury of Plaquemines Parish is a public agency which obligated itself to the United States of America to pay all expenses of this condemnation proceeding and any award for compensation that might be made in this proceeding, in accordance with the Rivers and Harbors Act of August 8, 1917, 40 Stat. 267 (33 U.S.C. 593).

4.

The Police Jury of Plaquemines Parish furnished the United States of America with the sum of $100,000.00 to cover the estimated costs of the awards of compensation for the parcels of land being condemned in this proceeding, which sum was deposited in the registry of the

court on February 5, 1952.

5.

On December 9, 1952 pursuant to 33 U.S.C. 594, the court ordered the United States of America to obtain additonal security from Plaquemines Parish, Louisiana, to make a total deposit or security of $250,000.00, to protect the interest of both the Government and the defendants.

6.

On January 19th, 1953 the Police Jury of Plaquemines Parish furnished the United States Government with a security bond of the National Surety Corporation, a New York Corporation, dated January 16, 1953, in the principal amount of $150,000.00, which bond named the National Surety Corporation as Surety, the Police Jury of Plaquemines Parish as Principal, and the United States of America as the Owner, which bond was filed in this proceeding and made a part of the record thereof.

7.

The condition of the security bond of the National Surety Corporation is that the Plaquemines Parish Police Jury will pay "all awards and expenses of the condemnation proceeding re: United States vs. 1,000 Acres of Land, more or less, in Plaquemines Parish, La., and I. D. Zander, et al No. 3362 Civil Action, in the U. S. District Court, New Orleans Division, for the Eastern District of La., embracing the acquisition of property, rights of way, servitudes, etc., in connection with the construction of the Alternate Waterway Connection with the Intracoastal Canal at Algiers, from Bayou Barataria in upper Plaquemines Parish to the point of connection of said canal at the Orleans Parish Line."

8.

On September 12th, 1958, a final judgment was entered in this proceeding confirming the awards of just compensation for the parcels of land in litigation and fixing the interest due on the said awards, and the fees of the Commissioners who had been appointed by the court to determine the awards.

9.

In addition to the original deposit in the amount of $100,000.00, the following additional sums were furnished the United States of America by the Police Jury of Plaquemines Parish and deposited in the registry of the court, exclusive of a deposit of $203.00 derived from the sale of improvements, to wit:

Date of Deposit	Amount
3/10/58	$101,945.75
4/16/58	20,675.00
TOTAL	$122,620.75

10.

The sum of $101,945.75, deposited in the registry of the court on March 10, 1958, was represented by a check drawn by the Police Jury of Plaquemines Parish on the Delta Bank and Trust Company, Port Sulphur, Louisiana, dated March 4, 1958. The deposit in the registry of the court on April 16, 1958, in the amount of $20,675.00, was represented by a check, dated March 27, 1958, drawn by the Police Jury of Plaquemines Parish on the Delta Bank and Trust Company.

11.

The total additional deposits in the amount of $122,620.75, described in No. 10 above, together with the

original deposit of $100,000.00 was sufficient to pay the principal of the litigated awards but was not sufficient to pay the interest on the said awards, nor the fees of the Commissioners which were fixed in the judgment of condemnation, dated September 12, 1958.

12.

The judgment of condemnation, dated September 12, 1958, fixed the interest on the litigated awards in the total amount of $31,302.21, and fixed the expenses of the proceeding for the fees of the Commissioners in the total amount of $21,500.00, which, in the aggregate, amounts to $52,802.21.

13.

There is in the registry of the court only the sum of $203.00 to be applied on the interest due on the litigated awards and the fees of the Commissioners, totaling $52,802.21.

14.

A motion was filed by the United States of America in this proceeding, praying that the National Surety Corporation, Surety, and the Police Jury of Plaquemines Parish, Principal, show cause why the security bond, dated January 16, 1953, filed in this proceeding, should not be declared forfeited to the extent of $52,599.21 and praying, further, that the court order the National Surety Corporation to pay into the registry of the court $52,599.21, pursuant to its obligation under the said bond.

15.

The Police Jury of Plaquemines Parish filed an answer to the motion of the United States of America, setting up the following defenses: (1) that a summary proceeding cannot be brought against the Surety and

Principal of the security bond; (2) a general denial; (3) that the additional payments in the registry of the court, totaling $122,670.75 reduced the liability of the Police Jury on the security bond from $150,000.00 to $27,379.25, and (4) in the alternative, urged a counterclaim or a reconventional demand against the United States of America for $238,800.00.

16.

The National Surety Corporation filed an answer to the motion of the United States of America, setting up the first three defenses urged by the Police Jury of Plaquemines Parish, as described in No. 15 above, and further urged a cross complaint against the Police Jury of Plaquemines Parish in the amount of $52,599.21, together with a claim for attorney's fees.

17.

The United States moved to dismiss the counterclaim and reconventional demand filed by the Police Jury of Plaquemines Parish for lack of jurisdiction of the person.

18.

All of the foregoing motions and answers were presented for hearing in open court on November 26, 1958 at which all parties were presented the opportunity to be heard in oral arguments. Thereafter, the matter was taken under advisement by the court.

19.

On December 2, 1958, the court granted the motion of the United States of America for forfeiture of the bond of the National Surety Corporation and directed that a form of judgment should be prepared.

The court further granted the motion of the Na-

tional Surety Corporation for judgment over and against the Plaquemines Parish Police Jury and directed that a judgment be prepared covering the claim over, but denied the claim of the National Surety Corporation for attorney's fees from the Plaquemines Parish Police Jury.

20.

On December 4, 1958 the court ordered that the motion of the United States of America to dismiss the counterclaim or reconventional demand of the Police Jury of Plaquemines Parish be granted.

21.

On December 10, 1958 a judgment was entered in favor of the United States of America decreeing the forfeiture of the bond of the National Surety Corporation, dated January 16, 1953, to the extent of $52,599.21, and decreeing further that there be judgment in favor of the United States of America, Owner, and against the National Surety Corporation, New York, Surety, in the full sum of $52,599.21, being the amount required to pay interest on the condemnation awards and the costs of this proceeding.

22.

On the 11th day of December, 1958, a judgment was entered on the cross complaint of the National Surety Corporation, New York, decreeing that the National Surety Corporation recover from the Police Jury of Plaquemines Parish the sum of $52,599.21 and that it have execution thereof.

23.

On January 14, 1959 there came on for hearing a motion for a new trial filed by the Police Jury of

Plaquemines Parish, based on the contention that there was no hearing on the merits of the second, third and fourth defenses set up in the answer filed by the Police Jury of Plaquemines Parish to the motion for forfeiture of the bond.

24.

On January 14, 1959 there likewise came on for hearing in open court a motion of the National Surety Corporation for a new trial, based on Articles I, II, and the last paragraph of Article III, of the motion for a new trial filed by the Police Jury of Plaquemines Parish.

CONCLUSIONS OF LAW

From the foregoing facts the court concludes:

1.

The amounts shown in Senate Document No. 188, of the 78th Congress, 2nd Session, on page 4 and 13 as the costs to local interests for furnishing the lands required for construction and spoil disposal are mere estimates of values as of 1944 and are not binding on either the United States of America nor the local interests obligated to pay such costs.

2.

This condemnation proceeding was filed by the United States of America pursuant to 33 U.S.C. 593, which statute requires that all expenses of the proceeding and any award that may be made thereunder be paid by the State or a public agency created by the State.

3.

The Police Jury of Plaquemines Parish is the public agency created by the State of Louisiana which is obli-

gated to pay all expenses and all awards made in this condemnation proceeding.

4.

The additional security in the amount of $150,000.00 which the court ordered on December 9, 1952 to be furnished, was a primary obligation of Plaquemines Parish and was ordered deposited in this proceeding to protect both the defendants to the proceeding and the United States of America (Minute Entry of December 9, 1952).

5.

The security bond of the National Surety Corporation, dated January 16, 1953, in the amount of $150,000.00, was furnished the United States of America by the Police Jury of Plaquemines Parish pursuant to the order of court of December 9, 1952 and was filed in and made a part of this condemnation proceeding.

6.

The aforesaid security bond in the amount of $150,000.00 filed in this proceeding by the National Surety Corporation, Surety, and the Police Jury of Plaquemines Parish, Principal, made the said Principal and Surety subject to the jurisdiction of this court in this particular action, and responsive to summary proceedings by motion, as provided for in 33 U.S.C. 594.

7.

33 U.S.C. 594 gives the defendants (respondents) to a condemnation proceeding the right to proceed by motion (summary process) at any time in the proceeding, to increase or change the amounts or securities, and specifically grants the court the further right to make such orders as shall be just in the premises and which will

adequately protect the defendants (respondents) to a condemnation proceeding.

8.

In every such case pursuant to 33 U.S.C. 594, there is a mandate imposed on the Government to diligently prosecute the condemnation proceeding to see that just compensation is promptly ascertained and paid. Therefore, the Government has the same summary right, by motion, to change the security from a bond to cash that the defendants (respondents) in a condemnation proceeding have. Particularly is this true in the case at bar since the additional security of $150,000.00 was ordered in this proceeding to protect both the defendants (respondents) and the Government.

9.

Unanimity of action by numerous defendants (respondents) in a condemnation proceeding is neither always feasible, nor always possible, nor always simultaneous. It is clear that 33 U.S.C. 594 gives the United States of America the right to proceed in behalf of all by summary process or motion against the principal and surety of a security bond, filed in and made a part of a condemnation proceeding, to convert the said bond to cash by forfeiture in order to fulfill the condition of the bond, namely, the payment of all awards and expenses of the condemnation proceeding which have not been paid by the principal.

10.

The awards alone do not constitute the entire element of just compensation. The full compensation granted by the constitution to property owners for the property taken for public use includes interest on the awards.

O'Donnell v. United States, 131 F. 2d 882; *United States v. Brooks-Scanlon Corp.*, 265 U.S. 106.

11.

The Police Jury of Plaquemines Parish and the National Surety Corporation are obligated under the terms of the security bond to pay to the United States of America an amount sufficient to pay the interest on the awards decreed in the judgment of condemnation dated September 12, 1958, which interest forms a part of the just compensation and is in the aggregate, $31,302.21.

12.

The Police Jury of Plaquemines Parish and the National Surety Corporation are obligated under the terms of the security bond to pay to the United States of America an amount sufficient to pay the Commissioners' fees decreed in the judgment of condemnation, dated September 12, 1958, as an expense of this proceeding, which fees are, in the aggregate, $21,500.00.

13.

There is available in the registry of the court only $203.00 to apply on the unpaid interest and the expenses comprising Commissioners' fees, leaving an unpaid obligation in the aggregate sum of $52,599.21, due the United States of America by the Police Jury of Plaquemines Parish and the National Surety Corporation.

14.

The Police Jury of Plaquemines Parish, Principal, and the National Surety Corporation, Surety, have not paid the United States of America the aggregate sum of $52,599.21, payment of which is guaranted by the security bond of the National Surety Corporation, dated

January 16, 1953, and have refused to make such payment to the United States of America.

15.

The bond of the National Surety Corporation is declared forfeited to the United States of America to the extent of $52,599.21, and judgment is rendered in favor of the United States of America against the National Surety Corporation in the full sum of $52,599.21.

16.

The payments made to the United States of America by the Police Jury of Plaquemines Parish and deposited in the registry of the court on March 10, 1958 and April 16, 1958 in the amounts of $101,945.75 and $20,675.00 respectively, which payments were made from the Parish funds by checks drawn on a Port Sulphur, Louisiana, bank, are merely payments which the Police Jury of Plaquemines Parish were obligated to furnish under the provisions of 33 U.S.C. 593, which partially discharged its obligation. These payments did not reduce the bond of the National Surety Corporation and could in no way reduce or limit the obligation of the Police Jury of Plaquemines Parish, under 33 U.S.C. 593, to fully pay all awards and all expenses of this proceeding.

17.

The counterclaim or reconventional demand of the Police Jury of Plaquemines Parish is dismissed for lack of jurisdiction.

Rule 71A, Subsection (a), reads as follows: "The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule." Since

Rule 71A does not grant the right to file a counterclaim or reconventional demand, Rule 13 (d) of the Federal Rules of Civil Procedure must be considered, which provides: "These rules shall not be construed to enlarge beyond the limits now fixed by law, the right to **assert counterclaims, or to claim credits against the United States or an officer or agency thereof.**"

The objection to a suit against the United States is fundamental whether it be in the form of an original action, a set-off, a counterclaim, a reconventional demand or cross complaint. Jurisdiction in any such case does not exist unless there is a specific Congressional authority for it. *Nassau Smelting Works v. United States*, 266 U.S. 201; *United States v. Shaw*, 309 U.S. 495; *Kansas v. United States*, 204 U.S. 331; *United States v. Meyer*, 113 F. 2d 387, and *United States v. 9 Acres of land, more or less, in St. Mary Parish, La.*, 100 F. Supp. 378 (Wright, D. J.) aff'd 197 F. 2d 1022 (5th Cir.) Cert. den. 344 U.S. 885.

18.

Motions for a new trial are denied.

January 26th, 1959.

s/ J. Skelly Wright
United States District Judge

APPENDIX B

33 U.S.C. Section 593

"Whenever any State, or any reclamation, flood control of drainage district, or other public agency created by any State, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of the Army may, in his discretion, cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of the Army: *Provided*, that all expenses of said proceedings and any award that may be made thereunder shall be paid by such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to secure which payment the Secretary of the Army may require such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to execute a proper bond in such amount as he may deem necessary before said proceedings are commerced. Aug. 8, 1917, c. 48, § 9, 40 Stat. 267."

33 U.S.C. Section 594

"Whenever the Secretary of the Army, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and

harbor improvements duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: *Provided*, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid. July 18, 1918, c. 155, § 5, 40 Stat. 911."

APPENDIX C

La. Civil Code—Article 3045

"The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound in solido jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors in solido."

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No. 725

In the Supreme Court of the United States

OCTOBER TERM, 1959

POLICE JURY OF PLAQUEMINES PARISH AND NATIONAL SURETY CORPORATION,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 9-10) is reported at 272 F.2d 827.

JURISDICTION

The judgment of the Court of Appeals was entered December 28, 1959 (Pet. App. 11). The petition for a writ of certiorari was filed on February 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court had jurisdiction, on motion of the United States, rather than by a separate action, to order forfeiture of a bond for nonpayment of condemnation awards and expenses.

STATUTES INVOLVED

Section 9 of the Rivers and Harbors Act of August 8, 1917, 40 Stat. 267, 33 U.S.C. 593, provides:

> Whenever any State, or any reclamation, flood control or drainage district, or other public agency created by any State, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of the Army may, in his discretion, cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of the Army: *Provided*, That all expenses of said proceedings and any award that may be made thereunder shall be paid by such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to secure which payment the Secretary of the Army may require such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to execute

a proper bond in such amount as he may deem necessary before said proceedings are commenced.

Section 5 of the Rivers and Harbors Act of July 18, 1918, 40 Stat. 911, 33 U.S.C. 594, provides:

> Whenever the Secretary of the Army, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvement duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: *Provided*, That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. * * *

STATEMENT

The facts of the present controversy, as stated in the district court's findings and the documentary evidence before it, may be summarized as follows:

The United States and local agencies undertook construction of a canal known as the Alternate Waterway Connection with the Intracoastal Canal. In 1947, the Police Jury of Plaquemines Parish (hereinafter referred to as "the Police Jury") adopted a resolution that it would provide "without cost to the United States" all necessary lands, etc., needed for the project and would execute the proper conveyance "free of cost to the United States". A second resolution of 1951 recited the inability of the Police Jury to acquire the needed lands by purchase and requested condemnation by the United States, repeating the earlier statement that it would provide the necessary lands without cost to the United States.

These proceedings were accordingly instituted in 1952 and $100,000, furnished by the Police Jury, was deposited as estimated compensation. Among other things, the landowners moved for an additional deposit. Saying that the primary obligation was on the Police Jury, the court ordered a total deposit of $250,000 or security in that amount. To satisfy this requirement a performance bond of $150,000 was filed in 1953 with the National Surety Corporation as surety. The condition of the bond was that the Police Jury "will pay all awards and expenses of the condemnation proceeding". In 1958, the Police Jury furnished the United States a total of $122,620.75 resulting from confirmation by the court of awards made by commissioners under Rule 71A(h), F.R.Civ.P., or amounts of settlements. There remained owing $52,599.21, composed of $31,302.21, representing interest for delay in payment of the

difference between the total awards and the deposits, and $21,500, representing the fees of the Rule 71A (h) commissioners. Judgment was entered against the United States for $52,802.21.

The United States demanded payment of the balance owing, but this was refused by both the Police Jury and the surety. The United States moved that the surety and the Police Jury show cause why the bond should not be forfeited and the surety ordered to pay into court $52,599.21. Besides opposing the motion, the Police Jury filed a counterclaim. The answer of the surety, besides asserting defenses, asserted a cross-complaint against the Police Jury for indemnity including attorneys' fees, costs and expenses.

On December 2, 1958, the court granted the Government's motion, and that of the surety, for judgment over against the Police Jury. Appropriate judgments were entered on December 11, 1958. In connection with the denial of the motions for a new trial the court filed Findings of Fact and Conclusions of Law setting forth the grounds of its rulings, holding, *inter alia*, that the filing of the bond and the statute gave the court authority to proceed summarily against the Police Jury and the surety.

The Court of Appeals affirmed, its *per curiam* opinion stating (Pet. App. 10):

> The appellants would have had no further rights had there been an independent action. The proceedings by motion accorded every right and advantage to the surety and principal. No possible harm could have resulted. F.R.Civ.P. 61. We find no basis for any of the other objections raised.

ARGUMENT

The petitioners do not here urge any objection upon the merits of the claim, but merely the procedural issue of whether their liability could be enforced by motion in the condemnation case. As the Court of Appeals held, any procedural defect would result in no harm under those circumstances. The court had jurisdiction of the matter and the parties pursuant to the regularly instituted condemnation proceeding. Nothing was to be gained by instituting a new suit.

The procedure taken was, we submit, perfectly proper. While the Rivers and Harbors Act did not specifically refer to summary proceedings, the court is authorized to "make such order as shall be just in the premises and as shall adequately protect the respondents." To impose a purely technical requirement of a separate suit would be contrary to the broad authority given the court. And, as the district court said, the real beneficiaries of this statute are the landowners but, being many in number, it is highly desirable, if not essential, that liability be enforced upon motion of the United States.

This situation is little different from that involving an overpayment under the Declaration of Taking Act which may be recovered back by summary proceedings in the condemnation case even though the statute does not so provide. *United States* v. *Miller*, 317 U.S. 369, 381-382; *Garrow* v. *United States*, 1 F. 2d 724 (C.A. 5), certiorari denied, 318 765. Applicable here is the holding in the case (p. 382): "The respondents had full ity to

urge any meritorious reasons why judgment of restitution should not be entered against them. We think they were entitled to no more."

Without indicating wherein they are prejudiced, the petitioners argue that local procedure requires filing of a separate complaint (Pet. 5). The interpretation of the federal statute is, of course, a matter of federal law and federal condemnation proceedings, both as to substance and procedure, are governed by federal law. *United States* v. *93,970 Acres of Land*, 360 U.S. 328. There is thus no room for application of Louisiana law here.

The petitioners suggest (pp. 4-5) that liability on the bond should be enforced by the landowners, not the United States. Those landowners were, as the trial court said, the beneficiaries of the deposits, but since the full faith and credit of the United States are behind the proceeding it is the United States that is primarily concerned with adequate security. Plainly, the statute contemplated that, as in any other federal condemnation proceeding, the judgment should be paid by the United States and the judgment contained the statement that the United States "cause to be deposited" $52,802.21. The petitioners suggest no substantial reason why the procedure followed by the district court was not entirely appropriate under these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

MARCH 1960

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